Supreme Court, U.S.
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No. 06-1463

In The
Supreme Court of the United States

ARNOLD M. PRESTON,

Petitioner,

v.

ALEX E. FERRER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA"), preempts California legislation regulating "talent agencies" (as defined by the legislation) that, as interpreted by California courts, provides that a dispute regarding contract validity (including a dispute arising from a contract with an arbitration provision) between an individual or a company that is alleged to have functioned as a talent agency without having obtained the required state license and an "artist" (e.g., performer), who is making that allegation, is to be initially submitted to an administrative agency that has expertise in matters pertaining to that type of dispute, where the legislation also provides that if either party is dissatisfied with the administrative agency's ruling, she/he/it has the right to have the dispute heard de novo by a court, unless it is determined that the arbitration provision requires that the de novo hearing be conducted by an arbitrator (which is a determination that has not yet been made in this case)?

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PRELIMINARY STATEMENT

The decision of the court below does not undermine the viability of arbitration provisions contained in contracts involving interstate commerce, nor does it invalidate the arbitration provision in Petitioner's contract with Respondent. The decision, which is of virtually no importance to other than a small group of individuals and companies, merely holds that, pursuant to an unusual statutory scheme created by the California legislature, certain disputes between individuals or companies that meet the statutory definition of a "talent agency" (regardless of whether they label themselves as such) and their artist clients, including the dispute between Petitioner and Respondent regarding the validity of their contract arising from Respondent's claim that Petitioner functioned as a talent agency notwithstanding his failure to obtain the requisite license, must, as an initial matter, be heard by the California Labor Commissioner, whose ruling is subject to a de novo hearing by a court, or in some circumstances an arbitrator, at the request of the party dissatisfied with the Commissioner's ruling. Accordingly, the decision of the court below is not in conflict with the FAA or *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006).

STATEMENT OF THE CASE

Petitioner Arnold M. Preston ("Preston") is a self-styled "artist's manager." Those who style themselves as "artist's managers" are often also referred to as "personal managers" or just "managers" and typically provide advice and counsel to individuals who perform services in the

entertainment industry, such as actors, directors, writers and musicians.

Respondent Alex E. Ferrer ("Ferrer") is a former Florida state court judge who now headlines the "Judge Alex" television program on which he arbitrates disputes.

In 2002, Ferrer signed a management contract with Preston (the "Agreement"). The Agreement, which contains an arbitration provision, was signed by Preston in California, where he resided at the time, and also contains a choice of law clause stating that "[t]his agreement shall be governed by the laws of the state of California, applicable to agreements wholly entered into and performed herein." (Pet. at App. 11a.)

The California Talent Agencies Act (the "Act") (Cal. Lab. Code, § 1700 et seq.) regulates the activities of a "talent agency," i.e., "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. . . ." (Cal. Lab. Code, § 1700.4, subd. (a).) "Artists" include persons such as Ferrer who render services in television programs. (*Id.*, subd. (b).) (Pet. at App. 5a.)

Section 1700.5 of the Act states that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the [California] Labor Commissioner." (Pet. at App. 5a.)

Section 1700.44, subdivision (a), of the Act states that "[i]n cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after

determination, to the superior court where the same shall be heard de novo." (Pet. at App. 5a.)

According to the California Supreme Court, the Labor Commissioner has "expertise in applying the Act." (Pet. at App. 7a.)

Preston does not assert that he ever has been a talent agency licensed by the California Labor Commissioner.

Ferrer refused to pay Preston the commission provided for in the Agreement that Preston alleged he was owed based on Ferrer's earnings from the "Judge Alex" program. In defense, Ferrer contends, among other things, that Preston functioned as a talent agency by attempting to secure employment for him and that the Agreement therefore is void pursuant to the Act, and Preston thus is barred from recovering under the Agreement.

Based on the Agreement's arbitration provision, Preston instituted an arbitration proceeding seeking the disputed commission. Thereafter, based on the Act, Ferrer filed a Petition to Determine Controversy with the Labor Commissioner seeking a ruling that the Agreement is void, and filed an action in California state court (the Superior Court for the County of Los Angeles) seeking, among other things, to preliminarily enjoin the arbitration from proceeding until the Labor Commissioner rules on the contract validity issue, which ruling would end the Commissioner's jurisdiction over the parties' dispute (an event that has not yet occurred). In response to Preston's opposition to Ferrer's Petition to Determine Controversy, the Labor Commissioner ruled that "the matter must be submitted to the Labor Commissioner for determination." (Pet. at App. 10a.) Ferrer obtained the preliminary injunction that he sought, and Preston filed an interlocutory

appeal. The California Court of Appeal affirmed the preliminary injunction order, holding that Preston was required to "exhaust his administrative remedies" (Pet. at App. 8a) in front of the Labor Commissioner "before resort may be had to another tribunal." (Pet. at App. 7a.) Preston's Petition for Review addressed to the California Supreme Court was denied. Preston then filed the instant Petition for a Writ of Certiorari.

There has been no ruling yet regarding who, as between the superior court and the arbitrator, will hear de novo the parties dispute regarding the validity of the Agreement in the event that the party who is dissatisfied with the ruling of the Labor Commissioner exercises his express statutory right under the Act to have the dispute heard de novo. Indeed, that issue has not yet even been addressed in any of the proceedings in this case, including those in the Court of Appeal.

REASONS FOR DENYING CERTIORARI

1. The Decision Below Does Not Raise the Question Presented In Preston's Petition And Does Not Void An Arbitration Agreement

The sole Question Presented in Preston's Petition is whether the FAA and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006), "preempt the holding in this case, voiding an interstate arbitration agreement under the California Talent Agencies Act?" (Pet. at i.) There is, however, no holding by the California Court of Appeal "voiding an interstate arbitration agreement" (i.e., the arbitration provision in the Agreement). In fact, there is nothing in the Court of Appeal's opinion that

contradicts the fact that, pursuant to the arbitration provision in the Agreement, the entirety of the dispute between the parties, including the issue of validity of the Agreement, may, at Preston's request, be heard and decided de novo by an arbitrator after the Labor Commissioner issues his ruling. Put simply, Preston grounds his Petition on the false premise that if he is dissatisfied with the Labor Commissioner's ruling regarding the validity of the Agreement and he exercises his right to have a de novo hearing, that hearing necessarily will be conducted by the superior court. (Pet. at 5.) However, the issue of whether the de novo hearing will be conducted by a court or an arbitrator has not yet been litigated in any forum in this case, including the Court of Appeal. Accordingly, notwithstanding the ruling that will emanate from the Labor Commissioner, the entirety of the parties dispute, including the issue of the validity of the Agreement, subsequently may be decided by an arbitrator.

A state legislative scheme which provides that at the request of a party to a dispute arising from a contract, including a contract containing an arbitration provision, an administrative agency with expertise in a field shall, as an initial matter, render a non-definitive ruling regarding the dispute, without prejudice to the dispute subsequently being heard and determined de novo by an arbitrator, is not inconsistent with either the letter or spirit of the FAA or *Buckeye*. In arguing that the California Court of Appeal misapplied *Buckeye*, Preston is mistaken.

Preston's assertion that the Court of Appeal holding "effectively renders arbitration agreements in Artist's Manager contracts unenforceable," (Pet. at 6) is wrong. First, as discussed below, the holding has no effect on managers who do not do business in California. Second,

the holding has no effect on contractual disputes between artists and managers who do conduct business in California, where the artists do not assert that their managers functioned as talent agencies even though not licensed to do so by the Labor Commissioner. Third, as discussed above, even where a manager's artist client asserts that the manager functioned as an unlicensed talent agency, the holding of the Court of Appeal does not render the arbitration provision in their contract unenforceable. Rather, the Court of Appeal merely held that disputes as to the validity of contracts between artists and individuals or companies who the artists allege functioned as unlicensed talent agencies are to be submitted, initially, to the Labor Commissioner. The Court of Appeal holding does not address the issue of who, as between an arbitrator and a court, decides such a dispute if the party dissatisfied with the Labor Commissioner's ruling exercises his statutory right to have a de novo hearing. As stated by the Court of Appeal, "The administrative procedures before the Commissioner must be resolved ***before*** resort may be had to ***another tribunal***," (Pet. at App. 6a & 7a) and "[T]he questions as to whether [Preston] is a talent agent and whether his contract with [Ferrer] is valid properly are submitted to the Commissioner ***in the first instance.***" (Pet. at App. 10a.)

2. The Question Presented Is Of Importance To Only A Limited Group Of Individuals And Companies

This case is virtually of no interest or importance to anyone other than to those who function in the California entertainment industry and, more particularly, to personal managers who (a) do business in California, (b) allegedly

function as unlicensed talent agencies, and (c) have contracts containing arbitration provisions with the artists who are making those allegations. There is no support for Preston's assertion that "this case impacts the entire profession, including Artist's Managers located outside of California who represent clients who reside in California or obtain employment in California." (Pet. at 6.) The Act, which requires individuals and corporations that function as talent agencies to become licensed by the California Labor Commissioner, applies only to those who do business in California. California cannot regulate the activities of managers who reside and do business in other entertainment centers such as New York City, Chicago, Detroit and Miami for clients residing outside of California.

Nor is there any reason to believe that the statutory scheme embodied in the Act, and therefore this case, otherwise has any nationwide importance. For example, Ferrer has no reason to believe that any state other than California has a statutory scheme that is similar to the one embodied in the Act and that relates to talent agencies in particular, or the entertainment industry in general, or any other industry, *i.e.*, a scheme whereby a contractual dispute must first be submitted to an administrative agency with expertise in the particular field of business for what amounts to an advisory, non-definitive ruling before the dispute is submitted, at the request of the party dissatisfied with the administrative agency ruling, for de novo hearing and decision by an arbitrator or a court.

3. Summary

The Court of Appeal in this California-centric case, which is of no national importance, did not purport to

decide who, as between an arbitrator and the court, will hear and decide de novo the issue of the validity of the Agreement in the event that Preston (a) is dissatisfied with the Labor Commissioner's ruling, (b) exercises his statutory right to have the dispute heard de novo, and (c) seeks to have that de novo hearing conducted, and the de novo decision made, by an arbitrator. If all of that comes to pass and Preston were to be precluded from having the dispute arbitrated by reason of a court ruling ordering that the required de novo hearing be conducted by the court, rather than by an arbitrator, then, and only then, would an issue arise as to whether there is a conflict with the FAA.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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